

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EFFYIS, INC., a Michigan corporation,
and HOTTOLINK, INC., a Japanese
corporation,

Case No. 18-CV-13391

Hon. Robert H. Cleland

Plaintiffs/Counter-Defendants,

v.

DARREN KELLY, an individual,

Defendant/Counter-Plaintiff.

**PLAINTIFFS/COUNTER-
DEFENDANTS' MOTION FOR
LEAVE TO AMEND DEFENSES**

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PLAINTIFFS/COUNTER-DEFENDANTS' MOTION
FOR LEAVE TO AMEND DEFENSES

NOW COME Plaintiffs/Counter-Defendants, EFFYIS, INC. and HOTTOLINK, INC. (collectively "Plaintiffs"), by and through their counsel, and hereby request leave to amend defenses filed to Defendant/Counter-Plaintiff's Counterclaim.

In support of its Motion, Plaintiffs rely upon the Brief in Support filed contemporaneously herewith and all exhibits attached thereto.

COMPLIANCE WITH LOCAL RULE 7.1—MOTION PRACTICE

On August 25, 2019, Louis Licata emailed Mr. Kelly's counsel of record, Daniel Villaire, Esq., to ascertain whether the request for leave to file amended answer to counter claim to add two affirmative defenses would be opposed and inviting a conversation regarding the request. As of August 30, 2019, Mr. Villaire had not provided his concurrence. Despite Movants reasonable efforts to obtain concurrence, the movant was unable to conduct a conference, so movant has been unable to obtain concurrence in the relief requested. This Motion and Brief were thereafter filed.

WHEREFORE, Plaintiffs respectfully request this Honorable Court grant EFFYIS, INC. and HOTTOLINK, INC. leave to file the answer attached hereto as Exhibit 2.

Dated: August 30, 2019

Respectfully submitted,

ABBOTT NICHOLSON, P.C.

By: /s/ William D. Gilbride, Jr.

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**PLAINTIFFS/COUNTER-
DEFENDANTS' BRIEF IN
SUPPORT OF MOTION FOR
LEAVE TO AMEND DEFENSES**

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CONCISE STATEMENT OF THE ISSUE

Should the Court grant leave to Plaintiffs/Counter-Defendants to file an amended answer and affirmative defenses to add defenses learned of through the course of discovery in this case?

Plaintiffs/Counter-Defendants say: “Yes.”

Defendant/Counter-Plaintiff says: “No.”

CONTROLLING AUTHORITIES

Foman v. Davis, 371 U.S. 178, 182 (1962)

Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982)

Fed. R. Civ. P. 15

**PLAINTIFFS/COUNTER-DEFENDANTS' BRIEF IN SUPPORT
OF MOTION FOR LEAVE TO AMEND DEFENSES**

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, and this Court's February 13, 2019 Scheduling Order, Plaintiffs/Counter-Defendants, Effyis, Inc. and Hottolink, Inc. (collectively, "Plaintiffs"), respectfully move this Court for leave to amend their Answer to the Counterclaim to assert additional affirmative defenses based on the defendant's failure to mitigate damages and the after-acquired evidence doctrine.

Leave to amend an answer shall be freely given when justice so requires. Fed. R. Civ. P. 15(a). The Supreme Court of the United States has further stated that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Accord: *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982) ("cases should be tried on their merits rather than the technicalities of pleadings"); *Washburn v. American Home Mortg. Servicing, Inc.*, Case No. 11-12890, at *2 (E.D. Mich. Dec. 22, 2011) ("This Rule is to be construed liberally... The underlying purpose of allowing parties to amend their pleadings is to permit the issues to be tried on the merits").

Also, the Court's Scheduling Order of February 13, 2019, provides a motion to amend is appropriate if "based on reasonable cause," as in the case of "newly discovered information." This motion is based upon reasonable cause and newly discovered information. Discovery was just completed on July 31, 2019, with the

exception of the deposition of Defendant Mr. Kelly, which proceeded by agreement on August 1, 2019. As a result of the documents retrieved, reviewed and produced in discovery, and as a result of the deposition testimony of Mr. Kelly, Plaintiffs now have “newly discovered information” that gives them “reasonable cause” to assert additional defenses to the Counterclaim.

With respect to mitigation of damages, Mr. Kelly refused to respond to inquiries directed to this issue during written discovery. See Responses to Plaintiffs’ Second Set of Interrogatories, #3:

Did you apply for any positions of employment during the period January 1, 2015 through December 18, 2019?
If your answer is “yes,” then please identify the following:
a. The name and address of the prospective employer;
b. The position for which you applied; and
c. The date you applied for the position.

ANSWER:

Defendant objects to this request since it is not relevant to the claim or defense of any party and the proportional needs of the case.

Id. (attached as Exhibit 1).

It was only during Mr. Kelly’s deposition on August 1, 2019 that Kelly answered questions about his attempts to find employment after his termination from Plaintiff/Counter-Defendant Effyis, Inc. Mr. Kelly’s deposition testimony taken on August 1, 2019 responses are “newly discovered information”/evidence

which support an affirmative defense for failure to mitigate damages with respect to the Counterclaim.

In addition, documents which came to light during the parties' extensive discovery process revealed that Mr. Kelly committed serious violations of Effyis' employee policies. If Plaintiffs had known of these violations during his employment, Mr. Kelly would have been terminated on the grounds of these violations. Had Plaintiffs known of this information at the time suit was initially filed, Plaintiffs would have pled these facts as another basis to terminate Mr. Kelly's employment. Thus, Plaintiffs have "newly discovered information" of a strong factual basis to assert of the affirmative defense of the after-acquired evidence doctrine and "reasonable cause" to amend their pleadings to accordingly.

Good cause exists to allow Plaintiffs to amend their Answer to the Counterclaim to include these two defenses at this time. Plaintiffs have exercised due diligence during the discovery process and have recently uncovered information unknown to them when the pleadings were first filed which requires the assertion of these additional defenses. As set forth above, it is in the interests of justice that this case be decided on the merits rather than on a technicality.

For the foregoing reasons, Plaintiffs respectfully request leave to amend their Answer to the Counterclaim to include the affirmative defenses set forth

above. A copy of the proposed First Amended Answer to Counterclaim is being filed contemporaneously herewith (Exhibit 2).

Dated: August 30, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, a copy of the foregoing *Motion for Leave to Amend Defenses* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to counsel of record for all parties indicated on the electronic filing receipt. Parties and their counsel may access this filing through the Court's system.

Dated: August 30, 2019

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